57,069

IN THE SUPREME COURT OF FLORIDA

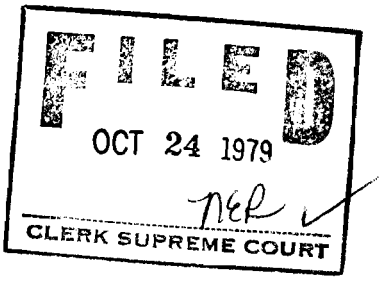
CASE NO. 57,069

STATE OF FLORIDA, :

-vs- :

ROBERT ALAN BENDER, :

Respondent. :



RESPONSE TO SHOW CAUSE ORDER

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CITATION OF AUTHORITIES

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:

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and of the Facts contained in the initial brief of the Petitioner, but wishes to invite the Court's attention to the following additional facts:

The lower court in its Order filed on May 21, 1979 rendered moot the Respondent's Motion to Suppress the Breathalyzer for Failure to Properly Incorporate Material by Reference on the grounds that the breathalyzer results were suppressed when the court granted the Respondent's Motion to Suppress the Breathalyzer Because of Improper Delegation of Authority (A-25). The court went further by stating that had it ruled differently on the Respondent's Motion to Suppress the Breathalyzer Because of Improper Delegation of Authority it would have held that the Respondent's "constitutional rights of due process and equal protection were violated by the failure of HRS and DHSMV to properly incorporate the procedures and methods of the manufacturers for the maintenance and operation of the breathalyzers." (A-21)

For the sake of brevity Respondent incorporates, by reference, the Appendix to Petitioner's Brief. Reference to the Appendix will be designated through the use of the letter "A".

ISSUE PRESENTED

WHETHER THE TRIAL COURT WAS CORRECT IN GRANTING THE RESPONDENT'S MOTION TO SUPPRESS

I. IMPROPER DELEGATION OF AUTHORITY

A. The Delegation Doctrine:

The Respondent's Motion to Suppress the Breathalyzer Because of Improper Delegation of Authority, which was granted by the Lower Court in the case at bar, attacked the constitutionality of the delegation of authority from the Florida Legislature to the Department of Health and Rehabilitative Services, and to the Department of Highway Safety and Motor Vehicles for the determination of a Defendant's blood alcohol content.

Section 322.261(1)(b)1, Florida Statutes (1977), states in a relevant part that:

> "An analysis of a person's breath, in order to be considered valid under the provisions of this section, must have been performed according to methods approved by the Department of Health and Rehabilitative Services."

Pursuant to this Statute, the Department of Health and Rehabilitative Services has promulgated rules governing the maintenance of equipment used to analyze a person's breath. Florida Administrative Code, Rule 10D-42.24, provides in pertinent part:

> "All chemical testing instruments and devices used under provisions of Chapter 322, Florida Statute, shall be operated in strict accordance with the procedures of the Department of Highway Safety and Motor Vehicles as contained in Chapter 15B-3 Florida Administrative Code, and in strict compliance with the procedure issued by the manufacturer and in strict compliance with the procedures issued by the manufacturer. Each instrument shall be given a complete preventive maintenance check at least

once in a calendar month by an assigned technician and a record made of the results." (Emphasis supplied).

The Rules of the Department of Highway Safety and Motor Vehicles, 15B-3.04(1), states:

"That all such instruments must be operated in strict accordance with the procedures issued by the manufacturer."

Furthermore, Section 322.261(2)(a), Florida Statutes (1977), states in relevant part that:

"The tests determining the weight of alcohol in the Defendant's blood, shall be administered at the direction of the arresting officer in accordance with rules and regulations which have been adopted by the Department. Such rules and regulations shall be adopted after public hearing and shall specify precisely the test or tests which are approved by said Department for reliability of results in facility of administration and shall provide an approved method of administration which shall be followed in all tests given under this section." (Emphasis supplied).

In referring the definitions for Chapter 322, Section 322.01(11), Florida Statutes (1977), "Department" is defined as:

"(11) Department: The Department of Highway Safety and Motor Vehicles."

The Respondent's Motion to Suppress Because of Improper Delegation of Authority filed in the trial court was grounded on two basic administrative law doctrines. The first is a delegation dectrine, which causes a statute purporting to confer power on an administrative agency to be held invalid because the Legislature cannot so delegate its power without violating the constitutional separation of power. Panama Refining Company v. Ryan, 293 U.S. 388 (1935).

This doctrine was applied by the Florida Supreme Court in Florida Dry Cleaning and Laundry Board v. Economy Kash 'N

Karry Clearners, Inc., 143 Fla.859, 197 So. 550 (Fla. 1940). There, the Statute provided for the selection of a Chief Supervisor the power to call hearings. The Court held that the statute did not contemplate this delegation of power to an employee, reasoning that only duly commissioned officers may legitimately exercise governmental powers. The delegation at issue in the instant case is not even to an employee of the agency, but was totally outside the agency to a presumably commercial manufacturer of the breathalyzer equipment. If the delegation in the last cited case was invalid, then a fortiori, the delegation here was invalid.

The Florida Supreme Court, in the case of Delta Truck Brokers, Inc. v. King, 142 So. 2d 273, (Fla. 1962) enunciated the fundamental principles pertaining to the delegation doctrine by declaring that:

> "The constitution vests the legislative power of the State in the State Legislature. Article II, Section 1, Florida Constitution, FSA."
>
> "The Legislature may, of course, delegate the performance of certain functions to administrative agencies provided that in doing so it announces adequate standards to guide the ministerial agency in the execution of the powers delegated."
>
> "The Legislature cannot delegate to an administrative agency, even one clothed with certain quasi judicial powers, the unbridled discretion to adjudicate private rights."
>
> "It is essential that the act which delegates the power likewise defines with reasonable certainty the standards which shall guide the agency in the exercise of the power."

Furthermore, in Louis v. Bank of Pasco County, 346 So. 2d 53 (Fla. 1976), the Florida Supreme Court held that:

> "This Court had held in a long and unvaried line of cases that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated. The statute must so clearly define the power delegated, that the administrative agency is precluded from acting through whim, showing favoritism or exercising unbridled discretion."

The Florida Supreme Court's latest expression on this subject is found in Florida Home Builder's Association v. Division of Labor, Bureau of Apprenticeship, 367 So. 2d 219 (Fla. 1979), where the Court, once again, held that:

> "Discretionary authority granted to the executive branch of government must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed".

It is submitted that this case is applicable and controlling to the instant case.

The Petitioner, by relying on State v. Griffin, 239 So. 2d 577 (Fla. 1970), argues, in essence, that the guidelines concerning the breathalyzer need by no more specific than in a situation governing the regulation of fruit. Such is simply not the case. The Defendant is not before an administrative board attacking the delegation because he stands to lose profits from fruit, he stands accused in a criminal prosecution and prays that this Court will affirm the trial court's decision suppressing evidence against him which was obtained, pursuant to an unlawful delegation of authority to a non-governmental entity. That, as the stakes are raised, so are the standards, appears to be basic to criminal law when one considers that criminal law requires a much higher standard of proof than administrative law. Agreico Chemical Company v. State Department of Environmental Regulations,

365 So. 2d 759, 763 (Fla. 1st DCA, 1978). Accordingly, the breathalyzer test cannot be classified with fruit inspections, considering the harsh criminal consequences. The State heavily relies on State v. Cumming, 365 So. 2d 153 (Fla. 1978). The Court there emphasized the conditions which made specific legislation impractical in the area of wildlife management. The State merely begs the question, failing to disclose what it is about a breathalyzer test which makes it an impractical subject of specific legislation. Wildlife may carry diseases depending on their point of origin and the manner in which they are kept. They may constitute varying degrees of nuisance, depending on the neighborhood in which they are kept. The analogy the State wishes this Court to draw to breathalyzer test is at best evasive and at worst, non-existent.

On the basis of its reading of Cumming, supra, the Petitioner concludes that administrative rules 15B-3 and 10D-42 do not give unbridled authority to the manufacturer, but are merely guidelines. This logic does not withstand a close scrutiny of those rules. They do nto purport to supply any guidelines whatsoever to the manufacturer but merely adopt any procedures the manufacturer may issue. These procedures bear directly on the reliability of tests administered under them. In this regard, Section 322.261(2)(a), Florida Statutes (1977), provides, in relevant part, that the agency "shall specify precisely the test or tests which are approved by said department for reliability of results..." (Emphasis added). The statute fails to supply any minimum acceptable reliability of results which are used to

to determine who has violated the law. A delegation such as this, without standards, violates the constitutionally mandated separation of governmental powers. In the words of the Florida Supreme Court, "where a statute passed by the legislature... authorizes an executive board, or some other named authority to decide what should and what should not be deemed infringement of the law, it must be held unconstitutional as attempting to make an improper delegation of legislative power." State ex rel Davis v. Fowler, 94 Fla. 752, 114 So. 435, 437 (Fla. 1927).

As a result of the delegation to the Department of Highway Safety and Motor Vehicles accomplished by this portion of Section 322.261(2)(a), a non-governmental entity, the manufacturer, is determining what should and should not be deemed an infringement of the law. The far reaching remifications of holding this to be a constitutional delegation of legislative authority are abhorrent to the American ideals of administrative and criminal justice.

B. The Ultra Vires Doctrine:

The second administrative law doctrine relied upon by the Respondent in his Motion to Suppress the Breathalyzer Because of Improper Delegation of Authority, is the ultra vires doctrine. under this doctrine, a challenger seeks to have administrative action declared invalid because it is outside the power conferred by statute. W. Gellhorn & C. Byse, Administrative Law, 58 (6th Ed. 1974).

This Court in State v. Cummings, supra, applied the ultra vires doctrine when it concluded that although Section

372.922 of the Florida Statutes was not an improper delegation of authority, the action taken by the Florida Game and Fresh Water Fish Commission in denying Cummings' application for a permit was invalid.

The Respondent contends that the actions of the Department of Health and Rehabilitative Services and the Department of Highway Safety and Motor Vehicles in re-delegating their rule-making power to the manufacturer, was beyond the scope of any authority conferred upon those agencies by Sections 322.261(1)(b)1 and (2)(a). It is well settled that the legislature may delegate its rule-making authority to administrative agencies within fixed and valid limits. State ex rel Davis v. Fowler, supra. The limits expressed by this statute here in question are approval of the Department of Health and Rehabilitative Services and the Department of Highway Safety and Motor Vehicles based upon a public hearing. By virtue of the rules here in question, these agencies have approved a blanket adoption of any procedures which may be issued by the manufacturer. Nothing appears which could safeguard against a manufacturer's changing those procedures without the approval of the agencies involved. From the plain language of Sections 322.261(1)(b)1 and (2)(a), this appears to be precisely the situation which the legislature intended to prevent: the possibility that these tests may be administered according to rules, regulations or procedures not approved by these agencies. This construction of the statute is further supported by the implications of the results of the tests in the criminal context and the rule that its legislative

expression of the manner is which administrative power shall be exercised implies a prohibition against any other method of achieving the prescribed legislative objective. This rule has consistently been endorsed by the First District Court of Appeal whose proximity to the seat of Florida government has afforded a vast experience in the judicial review of administrative action. Division of Family Services v. State, 319 So. 2d 72, 76 (Fla. 1st DCA, 1975); Forehand v. Border Public Construction, 166 So. 2d 688, 670 (Fla. 1st DCA, 1964).

Furthermore, this delegation of rule-making power to the manufacturer results in an enlargement of the provisions of the statute in violation of the rule that an administrative rule cannot be contrary to, nor enlarged, provisions of the Florida Statutes. Seitz v. Duval County School Board, 366 So. 2d 119 (Fla. 1st DCA, 1979); Sumlin v. Brown, 420 F.Supp. 78 (N.D. Fla. 1976).

While it is true that the departments in question were given broad discretion by Sections 322.261(1)(b)1 and (2)(b), the delegation of their authority to a non-governmental entity was an abuse of that discretion, resulting in prejudice to the Respondent in that he was not put on notice of the standards by which tests are to be administered.

For these reasons, the decision reached by the Lower Court should be affirmed and administrative rules 10D-42.24 and 15B-3.04(1), should be declared invalid as having been promulagated by the Department of Health and Rehabilitative Services and the Department of Highway Safety and Motor Vehicles in excess of the

power delegated to them by Sections 322.261(1)(b)1 and (2)(a), of the Florida Statutes. If follows that evidence obtained pursuant to an invalid regulation should not be admissible against the Respondent, just as evidence seized pursuant to an invalid police regulation would not be admissible.

II. FAILURE TO PROPERLY INCORPORATE MATERIAL BY REFERENCE

Additionally, the Respondent, in the lower court, filed a Motion to Suppress Breathalyzer for Failure to Properly Incorporate Material by Reference. In this motion, the Respondent attacked the admission of the breathalyzer test results on the grounds that the Department of Health and Rehabilitative Services and the Department of Highway Safety and Motor Vehicles did not properly adhere to provisions of the Florida Administrative Code and the purported delegation of authority as set forth in 322.261(1)(b)1 and (2)(a) and 322.262(3) Florida Statutes (1977). The Honorable Thomas E. Penick, Jr., County Judge, enunciated in his Order:

> "It should be kept in mind that any formal decision on defendant's third motion is rendered moot by the Court's ruling on defendant's second motion. However, this Court would point out that had it ruled differently on the said motion, it would rule that it has jurisdiction to render a decision on defendant's third motion. Further, this Court would have held that the defendant's constitutional rights of due process and equal protection were violated by the failure of HRS (Department of Health and Rehabilitative Services) And DHSMV (Department of Highway Safety and Motor Vehicles) to properly incorporate the procedures and methods of the manufacturers for the maintenance and operation of the breathalyzer."

As previously stated, Section 322.261(2)(a) Florida Statutes (1977), attempts to delegate to the Department of Highway Safety and Motor Vehicles the authority to establish

methods for the determination of the weight of alcohol in the Defendant's blood. Furthermore, Section 322.261(1)(b)1 and 322.262(3) Florida Statutes, purports to delegate to the Department of Health and Rehabilitative Services the authority to establish methods for the determination of the weight of alcohol in the Defendant's blood.

The Rules of the Department of Highway Safety and Motor Vehicles 15B-3.04(1) states, "that all such instruments must be operated in strict accordance with the procedures issued by the manufacturer." Likewise, the Department of Health and Rehabilitative Services, in Chapter 10D-42 provides that, "preventive maintenance shall be made in accordance with the procedures issued by the manufacturer on forms prescribed by the Department of Health and Rehabilitative Services."

As found by the trial court in the case of bar, "both HRS and DHSMV, failed to properly establish and incorporate the aforesaid method." The proper manner to incorporate any ordinances, standards, specifications or other similar materials is set forth in Chapter 1-1.04, Florida Administrative Code. Rule 1.1-0.4 states:

> "Any ordinance, standard, specification or other similar material which is generally available to affected persons and which is published by either a governmental agency or a generally recognized organization, may be incorporated in accordance with Chapter 120, Florida Statutes. A state agency shall file with the Department of State such ordinance, standard, specification or other similar material in its original form and it shall be accompanied by the appropriate certification of the reference material, a brief summary of the reference material and a written statement of the facts and circumstances and justification of the adoption by reference of the referred material."

As alleged by the Respondent in the trial court and as found by the Judge in his Order, both the Department of Health and Rehabilitative Services and the Department of Highway Safety and Motor Vehicles failed to properly establish and incorporate the methods prescribed by failing to file with the Department of State the manufacturer's procedures for operation and preventive maintenance of the breathalyzers.

To give Chapter 1-1.04 any effect in the face of the plain language of Section 322.261(2)(a), could be to allow it to enlarge the provisions of that section. This would do violence to the well-settled principle that administrative agencies are creatures of the legislature, each one's powers being limited to those contained in the statute by which it is created. State ex rel Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628, 633 (Fla. 1st DCA, 1974), cert. dismissed, 300 So. 2d 900 (Fla. 1974); St. Regis Paper Co. v. Florida Air Water Pollution Control Commission, 237 So. 2d 797, 799 (Fla. 1st DCA, 1970); Florida Industrial Commission v. National Trucking Company, 107 So. 2d 397, 399 (Fla. 1st DCA, 1958); Atlantic Coastline Railroad Co. v. State, 196 Fla. 278, 143 So. 255, 260 (1932).

Furthermore, Chapter 1.1.04, which allows incorporation by reference, is invalid because it violates the rule that an administrative rule or regulation cannot enlarge a provision of Florida Statutes, Seitz v. Duval County School Board, supra.

In the event that this Honorable Court gives effect to Chapter 1.104 Florida Administrative Code, in the case at bar, that rule must surely be construed strictly as being derogation of Section 322.261(2)(a). That rule, promulgated by the Department of State, would appropriately be construed as requiring strict compliance with the procedures expressed therein to affect an incorporation by reference. The agencies involved have failed to comply with the following requirements as required under the aforementioned rule.

It is important to note that the material sought to be incorporated by reference has a direct bearing on the reliability of the result which is best evaluated by the manufacturer. The administrative agencies involved have precluded any tests of reliability by failing to disclose the standards by which it would be measured. To suggest that the Respondent should have the burden in a criminal case of searching for the name and address of the manufacturer of the breathalyzer is order to obtain a copy of its procedural manual, is incredible. It presumes and requires a degree of intelligence and effort on the part of a criminal defendant which contravenes all applicable principles of law.

In addition to the failure to meet the following requirement of Florida Administrative Code, Chapter 1-1.04, the agencies involved in the administration of Section 322.261(1)(b)1 and (2)(a) of the Florida Statutes improperly applied Rule 1-1.04 to subject matter beyond its scope. Chapter 1-1.04 provides for incorporation by reference of material which is "generally avail-

able to affected persons and which is published by either a governmental agency or a generally recognized organization." It seems evident that the procedures issued by the manufacturer of a breathalyzer fail to meet any of these requirements. Therefore, those procedures are not a proper subject for application of Chapter 1-1.04.

CONCLUSION

Respondent, ROBERT ALAN BENDER, respectfully requests this Honorable Court to enter an Order affirming the Order of the Honorable Thomas E. Penick, Jr., County Judge, granting the Respondent's Motion to Suppress.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: Jim Smith, Attorney General, The Capital Building, Tallahassee, Florida 32304, and to Charles Corces, Jr., Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, this 23rd day of October, 1979.

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